87 886 (1)

No.

Supreme Court, U.S.
FILED
DEC 1 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN R. HARGROVE,

Petitioner,

v.

BOARD OF TRUSTEES OF THE
MARYLAND RETIREMENT SYSTEM,

Respondent.

**ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND**

PETITION FOR A WRIT OF CERTIORARI

M. ALBERT FIGINSKI
ETHAN L. BAUMAN
600 Charles Center South
36 South Charles Street
Baltimore, Maryland 21201-3060
(301) 332-8520
Counsel for Petitioner

12 PP

QUESTIONS PRESENTED FOR REVIEW

I. Whether the State of Maryland may deny, consistent with equal protection analysis, a retired State judge who is now a federal district judge his vested State judicial pension by application of a provision offsetting federal salaries applicable only to retired State judges but no other class of State employees?

THE PARTIES

The caption of the case in this Court contains the names of all parties.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED FOR REVIEW...	i
PARTIES.....	ii
OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL PROVISION AND STATUTE INVOLVED.....	2
STATEMENT OF THE CASE.....	5
REASONS FOR GRANTING THE WRIT.....	12
CONCLUSION.....	18
APPENDIX.....	1a
Published Opinion of the Court of Appeals of Maryland.....	1a
Dissenting Opinion of McAuliffe, J.	51a
Unpublished Opinion filed in the Circuit Court for Baltimore City.....	75a

TABLE OF AUTHORITIES

CASES

Attorney General of New York v. Soto-Lopez, ____U.S.____, 106 S.Ct. 2317 (1986)..... 13

City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249 (1985).....12,17

Hooper v. Bernalillo County Assessor, 472 U.S. 612, 105 S.Ct. 2862 (1985).....12

Oklahoma Broadcasters Ass'n v. Crisp, 636 F.Supp. 978 (W.D. Okl. 1985).....18

No.

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN R. HARGROVE,

Petitioner,

v.

BOARD OF TRUSTEES OF
THE MARYLAND RETIREMENT SYSTEM,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF MARYLAND

OPINIONS BELOW

The unpublished written opinion of the nisi prius judge, The Honorable Edward A. DeWaters, Jr., who

was specially assigned for the purposes of this case, as a Judge of The Circuit Court for Baltimore City, appears in the Appendix (App. 75a-97a).

The published opinion of The Court of Appeals of Maryland, Hargrove v. Board of Trustees, 310 Md. 406, 529 A.2d 1372 (1987), with dissent, appears in the Appendix (App. 1a-74a).

JURISDICTION

The Court of Appeals of Maryland affirmed the judgment of The Circuit Court for Baltimore City on September 2, 1987. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISION, AND STATUTE INVOLVED

Amendment XIV, §1, U.S. Const., provides, in pertinent part, that:

> No State shall...deny to any person within its jurisdiction the equal protection of the laws.

Pensions of judges and their surviving spouses, in the State of Maryland, are created by Article 73B, §55 et seq., Annotated Code of Maryland. The provisions pertinent to this case are in Article 73B, Section 56, Annotated Code of Maryland:

§56 (a) A judge, after termination of his service shall be paid the pension provided in the...plan, until his death.

(b) If a judge has reached the age of 60 at the time of the termination of his service,...the pension shall begin immediately....

(c)(1) [A] retired judge eligible for benefits under this subtitle may accept employment in which all or part of the compensation for the employment comes from municipal, county, State, or federal funds, if he immediately notifies the board of trustees of the Employees' Retirement System of his intention to accept the employment and specifies the compensation to be

received for the employment. The annual retirement allowance receivable by the former judge plus the annual compensation for the position may not exceed in amount the compensation upon which the retirement allowance is based. During any period in which the total of the annual compensation for the position in fact exceeds the compensation upon which the retirement allowance is based, the retirement allowance shall be reduced by that amount necessary to bring the former judge's total compensation within the limit specified in this subsection. If a retired judge accepts employment in accordance with this subsection and is subsequently awarded retirement benefits as a result of that employment, his retirement benefits under this subtitle shall be reduced in the amount of the retirement benefits resulting from the subsequent employment.

* * *

(d)(1) Upon the death of a judge at any age, his spouse shall be paid one half of the pension that would be payable from time to time to the judge if he were living and eligible to receive a pension.

* * *

(2) Upon the death of a former judge at any age, the surviving spouse of the former judge shall be paid one-half of the pension that would be payable from time to time to the former judge if the former judge were living and eligible to receive a pension.

* * *

STATEMENT OF THE CASE

This case arose because, on the advice of the Attorney General of Maryland, the Respondent Board of Trustees of the Maryland Retirement System refused, on the basis of the offset provisions of Art. 73B, §56(c)(1), Md. Code, to pay Petitioner Hargrove his vested pension benefits under the Maryland Judicial Pension Plan. A pertinent and concise statement of facts material to the consideration of the question presented was set forth in the majority opinion of the Court of Appeals of

Maryland, Hargrove v. Board of Trustees, 310 Md. 406, 411-2, 529 A.2d 1372, 1374-5 (1987),App., 7a-11a:

> Judge Hargrove's state judicial service began in February 1962 when he was appointed judge of the People's Court of Baltimore City. [3] After a short hiatus from the bench, Judge

---

3. When Judge Hargrove enrolled in the Judicial Pension Plan in 1962, a retired state judge could not receive his judicial pension as long as he held any "salaried public office or position, municipal, county, State or federal." Code (1957), Art. 26, § 49. In 1976, while Judge Hargrove was still on the state bench, this restriction was liberalized "[f]or the purpose of permitting a retired judge to accept salaried employment or office without loss of retirement benefits, subject to certain limitations and conditions." Ch. 501 of the Acts of 1976. The formula detailed in § 56(c)(1) was enacted in 1976 and has remain unchanged.

Hargrove was appointed to the Municipal Court of Baltimore City in March 1968, which was incorporated three years later into the District Court of Maryland. In July 1974, Judge Hargrove was appointed to the Supreme Bench of Baltimore City, redesignated in 1983 the Circuit Court for Baltimore City.

On February 17, 1984, Judge Hargrove retired from the Circuit Court for Baltimore City to accept an appointment as judge of the United States District Court for the District of Maryland. Judge Hargrove's tenure on the federal bench commenced February 18, 1984, and presently continues.

There is no dispute that on the date of his retirement from the Circuit Court for Baltimore City, Judge Hargrove had accrued sufficient years of membership service and contribution, and had attained the requisite age, to qualify immediately upon retirement for an annual pension equal to two-thirds of the annual salary of an active circuit court judge. [4] The Board of

---

4. Upon his retirement from the state bench or within six months thereafter Judge Hargrove was also entitled to

withdraw his contributions to the fund ($12,888.85) in a lump sum plus interest. Code (1957, 1983 Repl. Vol.), Art. 73B, § 57(k). Judge Hargrove opted not to withdraw from the pension plan.

Trustees of the Maryland Retirement System, however, has refused to pay Judge Hargrove any pension benefits, as his federal salary...plus his pension benefits...exceed the compensation on which his pension benefits are based.... [Footnote omitted.] Therefore, application of the formula in § 56(c)(1) results in a complete offset so that Judge Hargrove receives no state pension benefits.

In May, 1985, Petitioner Hargrove, through counsel, filed a complaint for declaratory judgment in the Circuit Court for Baltimore City. The Court of Appeals of Maryland capsulized the suit, 310 Md. at 413-4, 529 A.2d at 1375, App. 13a-15a, as follows:

Judge Hargrove contended that § 56(c)(1) "signifi-

cantly interferes with and infringes upon the right of retired state judges to engage in their chosen calling, by causing retired state judges to lose certain vested pension benefits if they accept employment compensated by municipal, county, state or federal funds." Judge Hargrove also alleged that the Judicial Pension Plan, as the only state pension plan providing for a reduction of benefits when the retiree accepts employment compensated by federal funds, "discriminates ...between the class of state retirees made up of persons who served as judges during their period of state employment and the class of state retirees who did not serve as judges during their period of state employment." Judge Hargrove asserted that the Board's failure to pay him any of his vested pension benefits violated his rights to equal protection of the laws and due process of the law. He relied on both Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment to the federal constitution. [7]

---

7. Prior to oral argument in this Court, it was unclear whether Judge Hargrove was relying on the federal constitution as well as the state constitution. At oral

argument counsel for Judge Hargrove made it clear that he was relying on both constitutions.

In the trial court, both Petitioner Hargrove and the Respondent Board filed motions for summary judgment. At the hearing on these motions, the parties stipulated, among other things, that:

> 16. Under Maryland law, there are the following systems: the Employees' Retirement System, the Teachers' Retirement System, the Employees' Pension System, the Teachers' Pension System, the State Police Retirement System, and the Judicial Pension Plan. The Governor's and Correctional Officers' retirement benefits are treated as part of the Employees' Retirement System. The Judicial Pension Plan is the only pension or retirement system that provides for reduction of vested pension benefits in the event that a retiree accepts employment compensated by federal funds. These various systems differ in many other of their terms and conditions....

> 17. By contrast with the Plaintiff, or any other retired judge of the State of Maryland, if the Governor, Lieutenant Governor, Attorney General, or Comptroller, all of whom are now attorneys, were appointed a federal district judge, each would be entitled to collect his full vested pension benefits.

In a written opinion and order, the Circuit Court for Baltimore City (DeWaters, J., specially assigned) granted the Respondent Board's motion for summary judgment (App. 97a).

An appeal was taken to Maryland's intermediate court of appeals, the Court of Special Appeals, but, before briefing and argument in that court, Maryland's highest court, the Court of Appeals issued a writ of certiorari to consider the appeal. On September 2, 1987, the Court of Appeals affirmed the trial court, 310 Md. 406, 529 A.2d

1372, (App. 1a-51a), with The Hon. John A. McAuliffe writing in dissent, 310 Md. at 427, 529 A.2d at 1382, (App. 51a-74a).

REASONS FOR GRANTING THE WRIT

In this case, this Court is again asked to subject a State statute to "equal protection analysis." See Hooper v. Bernalillo County Assessor, 472 U.S. 612, 618, n.6, 105 S.Ct. 2862, 2866, n.6 (1985). In City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 448, 105 S.Ct. 3249, 3259 (1985), this Court determined that, despite a host of purported rationales for the challenged legislation, "the record does not reveal any rational basis" for the challenged classification. Last year, this Court was substantially divided as to the correct process for applying the appropriate level of review when an equal protection

challenge is marshaled against a State statute. See Attorney General of New York v. Soto-Lopez, ____U.S., _____, 106 S.Ct. 2317 (1986). If the writ were granted in this case, the Court would have an opportunity to clarify the process to be used in equal protection analysis and the appropriate level of scrutiny to be applied where a State statute is upheld by a State's highest court even though a dissenting opinion terms the alleged rational justification "patently and impermissibly provincial and...contrary to the best interests of a strong federal government." See McAuliffe, J., dissenting, 310 Md. at 436, 529 A.2d at 1387, App. 74a.

A majority of the Court of Appeals of Maryland, below, concluded that "Section 56(c)(1) does not infringe a retired judge's right to pursue his

occupation or upon any similar personal right." 310 Md. at 422, 529 A.2d at 1380, App. 36a. Consequently, the court eschewed "heightened scrutiny" and reviewed the statute "under traditional and deferential rational basis principles." Id., App. 37a. The court, after such review, concluded, 310 Md. at 424, 529 A.2d at 1380, App. 41a:

> We are unable to say that § 56(c)(1) of the Judicial Pension Plan, as the only state employee pension plan to reduce pension benefits upon post retirement federal employment, has utterly no reasonable relation to the possible legislative goal of encouraging judges to remain on the state bench rather than accept federal employment.

In dissent, Judge McAuliffe challenged the "restrictive approach" of the court, i.e., its equal protection analysis, because the majority's method of dividing all cases

"into one of three classifications for determination of the level of scrutiny to be applied" failed to give "any consideration to the range of difference that may exist in the fact situations of cases within a single classification." 310 Md. at 428, 529 A.2d at 1382-3, App. 52a. Applying the "commendably flexible," "continuum" or "full spectrum" approach, "or even using the 'second order' rational basis approach," Judge McAuliffe found "the restrictive provision of the statute at issue constitutionally infirm." 310 Md. at 430, 529 A.2d at 1383-4, App. 57a. The dissenter articulated clearly the nature of a Maryland State Judicial Pension as part of a "compensation package" -- the pension is not a "windfall" but, rather "deferred compensation." He wrote, 310 Md. at

431-2, 529 A.2d 1384, App. 62a:

> Curtailment of the right to receive that which has been earned, and for which sacrifices have earlier been made, should be permitted only where demonstrably required to accommodate legitimate State interests.

Judge McAuliffe, then, posits the discriminatory feature. He wrote, 310 Md. at 433-4, 529 A.2d at 1385, App. 68a:

> The discrimination here is readily apparent. Of all State employees and officials, only judges suffer a setoff of pension benefits upon acceptance of a federal position. As the parties stipulated:
>
> > By contrast with the Plaintiff, or any other retired judge of the State of Maryland, if the Governor, Lieutenant Governor, Attorney General, or Comptroller all of whom now are attorneys, were appointed a federal district judge, each would be entitled to collect his full vested pension benefits.

Enumerating the putative grounds for the discrimination, Judge McAuliffe

carefully and clearly found each without rationality. See 310 Md. at 434-6, 529 A.2d at 1386-7, App. 68a-74a.

Judge McAuliffe's approach and analysis is in concert with this Court's equal protection analysis in City of Cleburne, where this Court, while recognizing that the rational basis approach affords government considerable latitude, wrote:

> The State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational.
>
> 473 U.S. at 105 S.Ct. at 3258.

Compare, Oklahoma Broadcasters Ass'n v. Crisp, 636 F.Supp. 978, 992 (W.D. Okl. 1985).

Equal protection analysis, properly applied to Art. 73B, § 56(c)(1), Md. Code, would nullify the offset

provision as it applies only to bar a retired Maryland judge his pension because of his compensation from federal judicial service.

CONCLUSION

For the foregoing reasons, John R. Hargrove respectfully requests that this Honorable Court grant his request for Writ of Certiorari.

Respectfully submitted,

M. ALBERT FIGINSKI *
ETHAN L. BAUMAN
36 South Charles Street
Baltimore, Md. 21201
(301)332-8520

Attorneys for Petitioner

* Counsel of Record

6927f

APPENDIX

John R. HARGROVE

v.

BOARD OF TRUSTEES OF the MARYLAND RETIREMENT SYSTEM.

No. 119, Sept. Term, 1985.

Court of Appeals of Maryland.

Sept. 2, 1987

Argued before MURPHY, C.J., and SMITH,* ELDRIDGE, COLE, RODOWSKY, COUCH* and McAULIFFE, JJ.

ELDRIDGE, Judge.

Maryland Code (1957, 1983 Repl. Vol.), Art. 73B, § 56(c)(1), provides that a retired state judge who accepts employment in which all or part of the compensation comes from governmental funds will have his state pension

---

* SMITH, J., and COUCH, J., now retired, participated in the hearing and conference of this case while active members of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, they also participated in the decision and adoption of this opinion.

benefits reduced to the extent that his compensation from the employment plus his judicial pension benefits exceeds the current salary of an active state judge at the same level. This case presents a challenge to the constitutionality of § 56(c)(1) under equal protection and substantive due process principles.

I.

The current Judicial Pension Plan is one of several retirement plans for state officials and employees. [1] A

---

1. The current Judicial Pension Plan is sometimes called the "contributory plan," and it is the plan in effect for all Maryland judges appointed or elected in recent years. It is the plan with which this case is concerned. An older, noncontributory plan, is also dealt with in the Code. See Maryland Code (1957), 1983 Repl. Vol.), Art. 73B, §§ 55(b), 55(h), 57, 58.

judge becomes vested in this plan upon accession to the bench, and is required to contribute 6% of his annual compensation to the pension fund for a maximum of 16 years. Under the plan, the annual pension payable to a retired judge is "two thirds of the salary payable in that fiscal year to a judge holding the same or same level judicial position as that in which the former judge served at the time of" retirement. Art. 73B, § 57(h).

Section 56(c)(1) of Article 73B contains the provision of the Judicial Pension Plan which is under attack in this case. The subsection provides as follows:

> "(c)(1) Except as provided in paragraph (2) of this subsection, a retired judge eligible for benefits under this subtitle may accept employment in which all or part of the compensation for the employment comes from

municipal, county, State, or federal funds, if he immediately notifies the board of trustees of the Employees' Retirement System of his intention to accept the employment and specifies the compensation to be received for the employment. The annual retirement allowance receivable by the former judge plus the annual compensation for the position may not exceed in amount the compensation upon which the retirement allowance is based. During any period in which the total of the annual retirement allowance and the annual compensation upon which the retirement allowance is based, the retirement allowance shall be reduced by that amount necessary to bring the former judge's total compensation within the limit specified in this subsection. If a retired judge accepts employment in accordance with this subsection and is subsequently awarded retirement benefits as a result of that employment, his retirement benefits under this subtitle shall be reduced in the amount of the retirement benefits resulting from the subsequent employment."

Under this subsection, a retired judge may accept local, state or federal governmental employment. Before his pension benefits are affected, he is entitled to receive from the public employment the difference between his plan benefits and the compensation on which his plan benefits are based. When a retired judge's total income from his public employment and pension benefits exceeds the compensation on which the pension benefits are based, there is a dollar-for-dollar offset of pension benefits for each additional dollar of public employment salary.

Under the pension plans applicable to most other retired state government

employees, [2] acceptance of permanent state government employment or certain local government employment results in a complete loss of state pension benefits; there is not simply an offset. See, e.g., Art. 73B, § 11(15)(b) (state employees retirement system); Art. 73B, § 86(9)(b) (teachers' retirement system). Nevertheless, federal government employment does not result in a pension loss or offset for nonjudicial state government retirees. Among retired state employees, it is only retired state judges whose pensions are offset

---

2. There are several different retirement plans applicable to State employees in Maryland. See, e.g., Art. 73B, § 1 et seq. (employees retirement system); Art. 73B, § 81 et seq. (teachers' retirement system); Art. 73B, § 158 (listing eight different plans).

by government employment, including federal government employment. Consequently, as to the effect of government employment on pension benefits, retired state judges are treated better than other retired state employees with regard to local and state government employment (offset as opposed to a complete loss) and are treated worse than other retired state employees with regard to federal government employment (offset as opposed to no effect).

II.

The offset provisions of the Judicial Pension Plan, Art. 73B, § 56(c)(1), are challenged in this case by John Hargrove, a judge of the United States District Court for the District of Maryland. Judge Hargrove's state judicial service began in February 1962

when he was appointed judge of the People's Court of Baltimore City. [3] After a short hiatus from the bench, Judge Hargrove was appointed to the Municipal Court of Baltimore City in March 1968, which was incorporated three years later into the District Court of Maryland. In July 1974, Judge Hargrove was appointed to the Supreme Bench of Baltimore City, redesignated

---

3. When Judge Hargrove enrolled in the Judicial Pension Plan in 1962, a retired state judge could not receive his judicial pension as long as he held any "salaried public office or position, municipal, county, State or federal." Code (1957), Art. 26, § 49. In 1976, while Judge Hargrove was still on the state bench, this restriction was liberalized "[f]or the purpose of permitting a retired judge to accept salaried employment or office without loss of retirement benefits, subject to certain limitations and conditions." Ch. 501 of the Acts of 1976. The formula detailed in § 56(c)(1) was enacted in 1976 and has remained unchanged.

in 1983 the Circuit Court for Baltimore City.

On February 17, 1984, Judge Hargrove retired from the Circuit Court for Baltimore City to accept an appointment as judge of the United States District Court for the District of Maryland. Judge Hargrove's tenure on the federal bench commenced February 18, 1984, and presently continues.

There is no dispute that on the date of his retirement from the Circuit Court for Baltimore City, Judge Hargrove had accrued sufficient years of membership service and contribution, and had attained the requisite age, to qualify immediately upon retirement for an annual pension equal to two-thirds of the annual salary of an active

circuit court judge. [4] The Board of Trustees of the Maryland Retirement System, however, has refused to pay Judge Hargrove any pension benefits, as his federal salary ($78,700) plus his pension benefits ($42,000) exceed the compensation on which his pension benefits are based ($65,900). [5] Therefore, application of the formula in § 56(c)(1) results in a complete

---

4. Upon his retirement from the state bench or within six months thereafter Judge Hargrove was also entitled to withdraw his contributions to the fund ($12,888.85) in a lump sum plus interest. Code (1957, 1983 Repl. Vol.), Art. 73B, § 57(k). Judge Hargrove opted not to withdraw from the pension plan.

5. These figures were taken from the parties' briefs, may be mere approximations, and may be somewhat outdated. Any variance between these approximations and the actual figures has no impact on the issues presented in this case.

offset so that Judge Hargrove receives no state pension benefits.

Consequently, on behalf of Judge Hargrove, the Maryland Administrative Office of the Courts sought an opinion from the Maryland Attorney General concerning Judge Hargrove's rights under the Judicial Pension Plan. Specifically, the Attorney General was asked to address whether Art. 73B, § 56(c)(1), applies to a retired state judge who becomes a federal judge, and if so, whether § 56(c)(1) deprives a retired judge of equal protection of the laws. The Attorney General responded with an opinion concluding that "the language of § 56(c)(1) unambiguously applies to any form of public employment, including federal judgeships." Opinion No. 84-025 at 151 (Oct. 3, 1984). Analyzing the equal

protection issue, the Attorney General applied the "rational basis test" and determined that the reduction in pension benefits was rationally related to the goal of avoiding "double dipping" into public funds. Id. at 156. [6] The Attorney General further stated that there was a rational basis for the distinction between retired state judges who accept federal employment and other state retirees who accept federal employment. The Attorney General noted that the Judicial Pension Plan

---

6. The Attorney General also determined that § 56(c)(1) was not invalid on the grounds that it: "(1) prevents a retired judge from pursuing his profession; (2) was beyond the authority of the General Assembly to enact; (3) deprives a retired judge of a vested property right; ... or (5) restricts a retired judge's right to receive deferred compensation." Id. at 149.

significantly differed from other state retirement plans. The Attorney General was of the view that "the General Assembly could rationally have concluded that the differences between the 'double dipping' provisions applicable to State judges and those applicable to other State employees are appropriate to the two groups' different situations, given especially the substantial differences in their underlying benefits." Id. at 157.

Subsequently, Judge Hargrove filed a complaint for declaratory judgment in the Circuit Court for Baltimore City. Judge Hargrove contended that § 56(c)(1) "significantly interferes with and infringes upon the right of retired state judges to engage in their chosen calling, by causing retired state judges to lose certain vested pension

benefits if they accept employment compensated by municipal, county, state or federal funds." Judge Hargrove also alleged that the Judicial Pension Plan, as the only state pension plan providing for a reduction of benefits when the retiree accepts employment compensated by federal funds, "discriminates...between the class of state retirees made up of persons who served as judges during their period of state employment and the class of state retirees who did not serve as judges during their period of state employment." Judge Hargrove asserted that the Board's failure to pay him any of his vested pension benefits violated his rights to equal protection of the laws and due process of the law. He relied on both Article 24 of the Maryland Declaration of Rights and the

Fourteenth Amendment to the federal constitution. [1/]

Both Judge Hargrove and the Board filed motions for summary judgment. In a written opinion and order, the Circuit Court for Baltimore City (DeWaters, J., specially assigned) granted the Board's motion for summary judgment. The court stated that the purpose of § 56(c)(1) was to protect "against double dipping while allowing public employment." The court concluded that the formula in § 56(c)(1), "based on the amount of pension, the amount of compensation from public employment and the salary

---

7. Prior to oral argument in this Court, it was unclear whether Judge Hargrove was relying on the federal constitution as well as the state constitution. At oral argument counsel for Judge Hargrove made it clear that he was relying on both constitutions.

of an active state judge," was a reasonable balance between the prevention of double dipping and the "utilization in the public sector of competent retired state judges." The court, relying on Clark v. Tawes, 187 Md. 195, 49 A.2d 463 (1946), rejected a requirement "that all state employees be treated alike by the legislature when pension bills are passed." The court also rejected Judge Hargrove's due process contention.

Judge Hargrove took an appeal to the Court of Special Appeals. Before briefing and argument in that court, we issued a writ of certiorari to address the important matter presented. We shall affirm.

III.

The distinctive feature of § 56(c)(1) giving rise to Judge Hargrove's constitutional challenge is that retired state judges are the only class of state retirees whose pensions are offset upon accepting post-retirement federal employment. The Board has advanced several legislative purposes for this classification. Specifically, the Board maintains that the purposes of § 56(c)(1) are to prevent the appearance of impropriety, to prevent double dipping, and to encourage state judges to remain on the bench rather than accept more lucrative public employment.

Relying upon our opinion in Attorney General v. Waldron, 289 Md. 683, 426 A.2d 929 (1981), Judge Hargrove urges this court to apply

"heightened scrutiny" when reviewing § 56(c)(1). Quoting from Waldron and from Hornbeck v. Somerset Co. Bd. of Educ., 295 Md. 597, 458 A.2d 758 (1983), Judge Hargrove states (Appellant's brief, pp. 13-14):

> "Heightened scrutiny' requires that a classification bear a 'fair and substantial relation' to the purpose of the legislation, Waldron II, 289 Md. at 709-10 [426 A.2d 929], 'so that all persons similarly situated and circumstanced will be treated alike.' Hornbeck v. Somerset Co. Bd. of Educ., 295 Md. 597, 642 [458 A.2d 758] (1983). Sheer speculation as to the legislature's purposes, and post hoc rationalizations offered in support of the statute, are not entitled to weight by the court. Waldron II, 289 Md. at 724 [426 A.2d 929]. Moreover, 'a loose fit between the legislative end and the means chosen to accomplish these goals, which leaves a significant measure of similarly situated persons unaffected by the enactment, or conversely, which includes individuals within the statute's purview who are not afflicted with the evil the

> statute seeks to remedy, is intolerable.' Id. at 713-14 [426 A.2d 929]. Therefore, 'this level of review does not tolerate random speculation concerning possible justification for a challenged enactment....' Hornbeck, 295 Md. at 642 [458 A.2d 758]."

Judge Hargrove maintains that, under the "heightened scrutiny" standard, "the unequal treatment between retired judges and all other state retirees is utterly without rational foundation and certainly does not bear any fair and substantial relation to the purposes of the law." (Appellant's brief, p. 14). He argues that there is "no substantial justification for the disparate treatment" of retired judges and other state retirees, that the policy against double dipping "applies equally to retired judges and to non-judicial state retirees," that the rationale of

encouragement to remain in state service is equally applicable to "any non-judicial retiree who accepts a more lucrative federal job," and that the "appearance of impropriety" argument, if valid at all, applies as well to non-judicial state retirees. (Id. at pp. 16-17, 22-27). Judge Hargrove contends that, under a "heightened scrutiny" analysis, the fact "that the State retirement plans may contain terms and conditions which are different as between various plans" does not justify the discrepancy in treatment between "retirees [who] are similarly situated." (Id. at 17).

Attorney General v. Waldron, supra, 289 Md. 683, 426 A.2d 929, involved a constitutional challenge on equal protection grounds to a Maryland

statutory provision which prohibited a retired judge, who was receiving his pension, from practicing law. The statute did not merely condition the continued receipt of pension benefits on refraining from the practice of law; instead, it was a direct outright prohibition upon the practice of law by a pensioned judge. No other retired state lawyer, official or employee was similarly prohibited from pursuing his or her occupation. This Court in Waldron pointed out that the equal protection concept embodied in Article 24 of the Maryland Declaration of Rights and the Fourteenth Amendment's Equal Protection Clause, while "independent [and] capable of divergent effect," generally mean the same and

apply in like manner. 289 Md. at 705-705, 426 A.2d 929. We reiterated that "decisions of the Supreme Court on the Fourteenth Amendment are - practically direct authorities'" with respect to Article 24 of the Declaration of Rights. Id. at 705, 426 A.2d 929, quoting from Bureau of Mines v. George's Creek, 272 Md. 143, 156, 321 A.2d 748, 755 (1974).

The Court in Waldron then discussed the appropriate standards for reviewing distinctions or classifications under equal protection principles. Judge Digges for the Court initially pointed out that a limited number of distinctions are subject to "strict scrutiny," saying (289 Md. at 705-706, 426 A.2d 929):

> "The top tier of this review contemplates that when a

> statute creates a distinction based upon clearly 'suspect' criteria, or when that enactment infringes upon personal rights or interests deemed to be 'fundamental,' then the legislative product must withstand a rigorous, 'strict scrutiny.' Laws which are subject to this demanding review violate the equal protection clause 'unless the State can demonstrate that such laws are "necessary to promote a compelling governmental interest"' Dunn v. Blumstein, 405 U.S. 330, 342, 92 S.Ct. 995 [1003], 31 L.Ed.2d 274 (1972) (quoting Shapiro v. Thompson, 394 U.S. 618, 634, 89 S.Ct. 1322 [1331], 22 L.Ed.2d 600 (1969) (emphasis in original)."

After reviewing several of the classifications subject to strict scrutiny because they fall in the "suspect" category (e.g., race, national origin, ancestry) or affect rights which have been deemed "fundamental" (e.g., First Amendment rights, right to vote, right to

interstate travel, etc.), the Court in Waldron turned to "traditional equal protection analysis" utilizing the rational basis test (id. at 706-707, 426 A.2d 929):

> "If, on the other hand, neither a suspect class nor a fundamental right or interest is implicated, then the traditional equal protection analysis calls forth a much less demanding standard of review under the second tier-the 'rational basis' test. Using this approach, a statutory classification is struck down, in the oft-expressed words of the Supreme Court, only if the means chosen by the legislative body are 'wholly irrelevant to the achievement of the State's objective.' McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101 [1105], 6 L.Ed.2d 393 (1961); McDonald v. Board of Election, 394 U.S. 802, 809, 89 S.Ct. 1404 [1408], 22 L.Ed.2d 739 (1969). The Supreme Court, in applying this test, has been willing to uphold the constitutionality of an enactment when 'any state of

facts reasonably may be conceived to justify it.' McGowan v. Maryland, supra at 426 [81 S.Ct. at 1105]. See Holt Civic Club v. City of Tuscaloosa, 439 U.S. 60, 99 S.Ct. 383, 58 L.Ed.2d 292 (1978); Kotch v. Pilot Comm'rs, 330 U.S. 552, 67 S.Ct 910, 91 L.Ed. 1093 (1947). This deferential review of state legislative classifications operates, at least in the sphere of economic regulation, 'quite apart from whether the conceivable "state of facts" (1) actually exists, (2) would convincingly justify the classification if it did exist, or (3) has ever been urged in the classification's defense by those who either promulgated it or have argued in its support.' L. Tribe, American Constitutional Law § 16-3, p. 996 (1978) (hereinafter cited as Tribe). See, e.g., Minnesota v. Clover Leaf Creamery Company [449], U.S. [456], 101 S.Ct. 715, 66 L.Ed.2d 659 (1981); U.S. Railroad Retirement Bd. v. Fritz [449], U.S. [166], 101 S.Ct. 453, 66 L.Ed.2d 368 (1980); McDonald v. Board of Election, supra; Allied Stores of Ohio v. Bowers, 358 U.S.

> 522, 528-29, 79 S.Ct. 437 [441-42], 3 L.Ed.2d 480 (1959); Kotch v. Pilot Comm'rs, supra; Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369 (1911)."

Next, the Waldron opinion observed that there were some classifications which have not been deemed to be suspect or to affect fundamental rights and thus have not been subjected to the "strict scrutiny" test, but which have also not been examined under the most deferential "rational basis" principles. After discussing several cases, Judge Digges described these classifications as giving rise to a "heightened scrutiny," saying (289 Md. at 711-712, 426 A.2d 929):

> "These cases apparently fall within two general categories which, not surprisingly, parallel the two groupings that trigger application of

the strict scrutiny test. First are those enactments which impact upon 'sensitive, although not necessarily suspect criteria of classification.' Tribe at 1090. To date, this group clearly encompasses gender discriminations, e.g., Caban v. Mohammed, 441 U.S. 380, 99 S.Ct. 1760, 60 L.Ed.2d 297 (1979); Craig v. Boren, supra, [429 U.S. 190, 197, 97 S.Ct. 451, 456, 50 L.Ed.2d 397 (1976)], and probably includes those classifications based on illegitimacy. See Trimble v. Gordon, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977). The second category of statutes which activate heightened scrutiny are those which affect 'important' personal interests or work a 'significant interference with liberty or a denial of a benefit vital to the individual.' Tribe at 1090. Professor Tribe's amorphous characterization of this category derives from an analysis of decisions which share that quality. We find United States Department of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), typical of this genus, where an amendment to the federal food stamp program which denied the stamps to households comprised of unrelated members was held

> irrational despite government assertions that the provision helped to prevent fraud. See also Eisenstadt v. Baird, supra [405 U.S. 438, 447, 92 S.Ct. 1029, 1035, 31 L.Ed.2d 349 (1972)]; Hampton v. Mow Sun Wong, 426 U.S. 88, 102-03, 96 S.Ct. 1895 [1905], 48 L.Ed.2d 495 (1976) (alien's 'ineligibility for employment in a major sector of the economy' characterized as 'deprivation of an interest in liberty' and warranting 'some judicial scrutiny'). See Vlandis v. Kline, 412 U.S. 441, 459, 93 S.Ct. 2230 [2240], 37 L.Ed.2d 63 (1973) (White, J., concurring) (denial of reduced tuition to out-of-state students who became residents interfered with 'interest...[in] obtaining a higher education')."

Judge Digges went on for the Court (id. at 713, 426 A.2d 929):

> "[W]hen important personal rights, not yet held to merit strict scrutiny but deserving of more protection than a perfunctory review would accord, are affected by a legislative classification, a court should engage in a review consonant with the importance of the personal right involved. This latter

> judicial inquiry does not tolerate random speculation concerning possible justifications for a challenged enactment; rather, it pursues the actual purpose of a statute and seriously examines the means chosen to effectuate that purpose."

The Court in Waldron concluded that the statutory classification involved in that case was subject to "heightened scrutiny," as the prohibition upon the practice of law by judicial pensioners "flatly denies one the right to engage in the practice of the profession for which he is otherwise qualified." 289 Md. at 717, 426 A.2d 929. The Court, after reviewing the proffered justifications for the statutory discrimination, held that the statute violated the Equal Protection Clause of the Fourteenth Amendment and the equal protection principle embodied in Article 24 of the Declaration of

Rights. It was pointed out that the statute made a classification which bore no relationship to the claimed legislative goal of preventing impropriety, that the classification was underinclusive in that it omitted some persons who should have been subjected to the regulation in order to attain the stated legislative purpose (other retired state lawyers were permitted to practice law for compensation), and that the statute permitted retired judges to practice law if they did so without compensation. For more recent cases applying the equal protection principles reviewed in Waldron, see, e.g., United Wire v. State Deposit Ins. Fund, 307 Md. 148, 157-161, 512 A.2d 1047 (1986); Broadwater v. State, 306 Md. 597, 606-608, 510 A.2d 583 (1986);

Ennis v. State, 306 Md. 579, 591, 594-597, 510 A.2d 573 (1986); State v. Wyand, 304 Md. 721, 726-730, 501 A.2d 43 (1985), cert. denied, ____U.S.____, 106 S.Ct. 1492, 89 L.Ed.2d 893 (1986); Whiting-Turner Contracting Co. v. Coupard, 304 Md. 340, 350-358, 499 A.2d 178 (1985); Department of Transportation v. Armacost, 299 Md. 392, 408-414, 474 A.2d 191 (1984); State v. Good Samaritan Hospital, 299 Md. 310, 326-329, 473 A.2d 892, appeal dismissed, 469 U.S. 802, 105 S.Ct. 56, 83 L.Ed.2d 7 (1984); Hornbeck v. Somerset Co. Bd. of Educ., supra, 295 Md. at 640-657, 458 A.2d 758. See also Cleburne v. Cleburne Living Center, 473 U.S. 432, 105 S.Ct. 3249, 87 L.Ed.2d 313 (1985), for a recent Supreme Court discussion of the matter.

Turning to the present case, Judge Hargrove does not argue that Art. 73B, § 56(c)(1), involves a suspect classification or a fundamental right. Thus, the statute is concededly not subject to the strict scrutiny test. The principal thrust of Judge Hargrove's argument is that the pension offset provision of § 56(c)(1) significantly interferes with his right to pursue his chosen calling as a federal judge, and that, therefore, the provision is subject to a "heightened scrutiny." He equates § 56(c)(1) with the statute invalidated in Waldron, and argues that the Waldron case compels the invalidation of § 56(c)(1). We disagree.

Unlike the provision challenged in Waldron, § 56(c)(1) does not prohibit a retired state judge, such as Judge

Hargrove, from practicing law, accepting a position as a government attorney, or accepting a federal judgeship. Instead, § 56(c(1) explicitly recognizes the right of a retired judge to accept public employment after retirement: "a retired judge eligible for benefits under this subtitle may accept employment in which all or part of the compensation for the employment comes from municipal, county, State or federal funds...(emphasis added)." This is clearly distinguishable from the statute invalidated in Waldron, which provided that "a judge who retires and accepts the pension provided by this subtitle may not, thereafter, engage in the practice of law for compensation." See Code (1957, 1978 Repl. Vol.), Art. 73B § 56(c)

(emphasis added).

Instead of operating as a prohibition upon the pursuit of a chosen calling, § 56(c)(1) operates as a limitation upon the amount of a judicial pension to be received; in order to receive a full judicial pension, a retired judge may not earn from public employment an amount that exceeds the difference between his pension benefits and the salary upon which his benefits are based. This distinction was expressly recognized and relied on in Waldron, 289 Md. at 723, 426 A.2d 929, where we noted that the statute there at issue

> "prohibits the practice of law for compensation by a former judge who accepts his pension. By its very terms, it does not reduce benefits in proportion to the judge's outside income, nor is receipt of the pension conditioned on a judge refraining from

> engaging in his chosen profession."

We pointed out (id. at 716, 426 A.2d 929):

> The [challenged] statute does not establish a precondition for receipt of the pension; rather, it flatly prohibits this group of state pensioners from engaging in their profession for pay." [8]

Furthermore, the practical effect of § 56(c)(1) is unlike the effect of the statute invalidated in Waldron. In Waldron, the statute compelled a retired judge to choose between receiving his pension and practicing

---

8. See also Chairman of Board v. Waldron, 285 Md. 175, 180-181, 401 A.2d 172 (1979), where we distinguished former § 56(c) from its predecessor. The predecessor statute merely conditioned the receipt of a judicial pension, and did not prohibit a pensioned judge from engaging in the practice of law for compensation.

his chosen occupation. Section 56(c)(1) does not require such an "either or" choice. After his retirement, Judge Hargrove was free to enter private practice and receive his full pension. He was also free to earn from public employment the difference between his pension and the salary upon which it was based, without any reduction in pension benefits. Finally, Judge Hargrove was free to accept public employment at a higher salary and receive his offset pension.

The differences between § 56(c)(1) and the statute involved in Waldron are obvious and compelling. Section 56(c)(1) does not infringe upon a retired judge's right to pursue his occupation or upon any similar personal right. Instead, it merely regulates the amount of pension benefits upon

certain contingencies. For these reasons, we hold that a "heightened scrutiny" standard is not applicable here, and that § 56(c)(1) should be reviewed under traditional and deferential rational basis principles. See Jackson Firefighters Ass'n v. City of Jackson, 736 F.2d 209 (5th Cir. 1984) (rational basis test used to determine validity of disparate treatment under municipal retirement plans); In re Marriage of Alarcon, 149 Cal.App.3d 544, 196 Cal.Rptr. 887 (1983) (rational basis test applied to dsetermine validity of judicial pension statute that reduced benefits by amount of salary as a federal judge); Allen v. State, 100 Nev. 130, 676 P.2d 792 (1984) (rational basis test applied to uphold statute that raises benefits for future, and not present, retirees);

Reiser v. Pension Com'n of Emp. Retirement System, 147 N.J.Super. 168, 370 A.2d 902 (1976) (rational basis test applied to determine validity of pension statute that provided different standards for awarding widow's benefits); Automobile, Etc. v. Department of Retirement, 92 Wash.2d 415, 598 P.2d 379 (1979), appeal dismissed, 444 U.S. 1040, 100 S.Ct. 724, 62 L.Ed.2d 726 (1980) (rational basis test applied to determine validity of excluding port police from law enforcement officers' retirement system).

As recently pointed out by Judge Rodowsky for the Court in Whiting-Turner Contracting Co. v. Coupard, supra, 304 Md. at 352, 499 A.2d 178, under such a rational basis test, a statutory classification

> "enjoys a strong presumption of constitutionality, [and] can be invalidated only if the classification is without any reasonable basis and is purely arbitrary. Further, a classification having some reasonable basis need not be made with mathematical nicety and may result in some inequality. If any state of facts reasonably can be conceived that would sustain the classification, the existence of that state of facts at the time the law was enacted must be assumed."

See, e.g., Broadwater v. State, supra, 306 Md. at 607, 510 A.2d 583; Ennis v. State, supra, 306 Md. at 595, 510 A.2d 573; State v. Wyand, supra, 304 Md. at 727-728, 501 A.2d 43; Hornbeck v. Somerset Co. Bd of Educ., supra, 295 Md. at 642, 458 A.2d 758; Neville v. State, 290 Md. 364, 383, 430 A.2d 570 (1981); Governor v. Exxon Corp., 279 Md. 410, 439, 370 A.2d 1102 (1977), aff'd, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); Bowie Inn v. City of

Bowie, 274 Md. 230, 241, 335 A.2d 679 (1975).

In our view, Judge Hargrove has not demonstrated the total lack of any rational basis underlying § 56(c)(1). Some legislators may have considered it problematic that judges might be wooed from the state bench by offers of federal employment. Similarly, some legislators may not have considered as problematic the number of nonjudicial state employees retiring in order to pursue federal employment. It is properly within the judgment of the General Assembly to determine what incentives may be needed to retain state judges. One reasonable incentive is to offset a judicial pension by the amount of federal salary received by a retired judge when his total income exceeds the amount of salary he would

have received had he stayed on the State bench. We are unable to say that § 56(c)(1) of the Judicial Pension Plan, as the only state employee pension plan to reduce pension benefits upon post retirement federal employment, has utterly no reasonable relation to the possible legislative goal of encouraging judges to remain on the state bench rather than accept federal employment.

There may be some merit in Judge Hargrove's criticisms of this or other possible legislative purposes underlying the difference in treatment between retired state judges accepting federal government employment and other retired state employees accepting such employment. Nonetheless, it is not our province to determine the fairness or desirability of legislative

classifications. See Hornbeck v. Somerset Co. Bd. of Educ., supra, 295 Md. at 658, 458 A.2d 758. As Chief Judge Murphy stated for the Court in Department of Transportation v. Armacost, supra, 299 Md. at 413, 474 A.2d 191, "[w]e need not be convinced that the reasons for the distinctions are good ones; that is a question for the legislature. Rather, we need only find that there is some rational relationship between the legislature's goal and the means chosen to achieve it."

Moreover, not all variances among different pension systems need be justified by the State. This was pointed out by the Court in Clark v. Tawes, supra, 187 Md. at 200, 49 A.2d 463: "The class of statutes usually known as retirement acts which provide

pensions for different classes of State employees need not be alike as to all employees." The Judicial Pension Plan for retired Maryland judges contains some advantages not found in other plans. For example, as previously mentioned, retired judges may accept permanent post-retirement employment at the state and local level, subject only to an offset, while other retired state employees will lose their pension benefit if they accept certain such permanent employment. The Judicial Pension Plan has the shortest vesting period (i.e., none at all, as vesting is immediate upon accession to the bench), one of the earliest retirement ages, one of the highest benefit levels, and is among the most generous in providing survivor and disability benefits. As the various state pension

plans have evolved with many amendments to one or another over the years, each one is different from the others. In some respects the Judicial Pension Plan is superior to the others and in some respects inferior. These discrepancies do not invalidate the plan on constitutional grounds. See U.S.R.R. Retirement Bd. v. Fritz, 449 U.S. 166, 177, 101 S.Ct. 453, 460, 66 L.Ed.2d 368 (1980) ("Because Congress could have eliminated windfall benefits for all classes of employees, it is not constitutionally impermissible for Congress to have drawn lines between groups of employees for the purpose of phasing out those benefits"); Jackson Firefighters Ass'n v. City of Jackson, supra, 736 F.2d at 210 ("The equal protection clause does not require that all public employees whenever employed

receive the same pension...benefits").

IV.

While Judge Hargrove did not advance this argument, the dissenting opinion suggests that § 56(c)(1) is unconstitutional because it may deter qualified state judges from accepting appointments to the federal bench. The dissent attempts to illustrate this proposition through an analogy to the Supreme Court's ballot access cases.

The ballot access cases hold that the right to run for elective office is important although not fundamental, Bullock v. Carter, 405 U.S. 134, 143, 92 S.Ct. 849, 856, 31 L.Ed.2d 92 (1972). Therefore, the Equal Protection Clause of the Fourteenth Amendment prohibits the states from restricting ballot access through "invidiously discriminatory

classifications," Turner v. Fouche, 396 U.S. 346, 362, 90 S.Ct. 532, 541, 24 L.Ed.2d 567 (1970), from imposing excessive filing fees upon candidates for elective office, Bullock v. Carter, supra, 405 U.S. at 143-144, 92 S.Ct. at 856, or from providing that political parties meet very restrictive requirements before they may be placed on ballots, Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24 (1968). See also Jenness v. Fortson, 403 U.S. 431, 91 S.Ct. 1970, 29 L.Ed.2d 554 (1971).

The ballot access cases are largely grounded in the principle that, by diminishing the number of choices available to voters, burdensome restrictions upon the pool of candidates impair the fundamental right to vote. Therefore, as the dissent

appears to recognize, the constitutional right to be a candidate for elective office is a corollary of the constitutional protection of the elective franchise. It is unclear why the ballot access cases should be relevant at all in a case, such as this one, involving an asserted "restriction" upon the ability to accept an appointed position-a federal judgeship. Voters have no opportunity to pass upon the qualifications of candidates for the federal bench; therefore, even if § 56(c)(1) did in fact deter some qualified state judges from accepting appointments to the federal bench, it would not diminish the number of choices available to voters. Hence, the ballot access cases are simply irrelevant.

Moreover, § 56(c)(1) could not logically be a financial deterrent keeping state judges from accepting appointments to the federal bench. Whenever federal judicial salaries are greater than the salaries of Maryland judges, as is currently the case, a state judge will benefit financially by accepting an appointment to the federal bench. But, in the event that the General Assembly were to raise state judges' salaries to a level greater than that in the federal judiciary, there would be no financial disincentive for a state judge, eligible to retire at full pension, to retire and accept a federal judicial appointment. Under § 56(c)(1), the former state judge's pension benefits would only be offset to the extent that his federal salary plus his pension

benefits would exceed the compensation on which his pension benefits are based-a state judge's salary. Finally, even if a former state judge's pension benefits are partially or completely offset because of his current federal salary, the judge, by accepting subsequent public employment, does not forfeit his entitlement to state pension benefits. Instead, the receipt of full state pension benefits is simply deferred until the judge's ultimate retirement from public service. At that point, he will receive both his full state pension and any federal pension to which he is entitled. Consequently, it is implausible to suggest that § 56(c)(1) is a financial deterrent that might keep qualified state judges from accepting appointments to the federal

bench.

V.

Finally, Judge Hargrove contends that Art. 73B, § 56(c)(1), is invalid under the due process guarantees of the Fourteenth Amendment and Article 24 of the Maryland Declaration of Rights. He alleges that the "federal offset is irrational in and of itself, regardless to whom it is applied," and therefore it violates his "right to substantive due process." (Appellant's Brief, p. 36).

A statute such as § 56(c)(1) will not be held to violate due process guarantees unless the act "is shown to be arbitrary, oppressive or unreasonable.... Moreover, the wisdom or expediency of [the] law...is not subject to judicial review, and such a statute will not be held void if there

are any considerations relating to the public welfare by which it can be supported." Westchester West No. 2 v. Mont. Co., 276 Md. 448, 455, 348 A.2d 856 (1975). For the reasons set forth in Parts III and IV above, § 56(c)(1) is not invalid under this test.

JUDGMENT AFFIRMED, WITH COSTS.

McAULIFFE, J., dissents.

McAULIFFE, Judge, dissenting.

I agree that this case is not directly analogous to Waldron [1] but I believe that this statutory deprivation of earned compensation cannot survive a proper equal protection analysis. My disagreement with the majority is two-fold. First,

---

1. Attorney General v. Waldron, 289 Md. 683, 426 A.2d 929 (1981).

I do not accept the restrictive approach requiring that all cases be divided into one of three classifications for determination of the level of scrutiny to be applied without any consideration of the range of difference that may exist in the fact situations of cases within a single classification. Second, I believe the majority has adopted too narrow a focus with respect to the important rights affected by this legislation, restricting its consideration to the impact upon judges and failing to consider as well the impact upon the federal judicial system and the rights of the people as a whole.

On the first point, there was a time not so long ago when the equal protection analysis employed only two categories of cases: 1) those

involving "fundamental" personal rights or involving distinctions based upon clearly "suspect" criteria and, 2) all other cases. Cases falling into the first category were said to be entitled to the demanding review of "strict scrutiny" while those failing to make that category were relegated to a "rational basis" test. Waldron, supra, 289 Md. at 705-07, 426 A.2d 929. As Judge J. Dudley Digges pointed out for the court in Waldron, the practical result of this rigid two-tier analysis was that the determination of the classification in large measure dictated the outcome of the cases. Legislation in cases in the first category was nearly always struck down under an analysis that is "strict in theory and fatal in fact," and legislation in other cases almost

invariably survived, receiving "minimal scrutiny in theory and virtually none in fact." Waldron, supra, 289 Md. at 707-08, 426 A.2d 929, quoting Gunther, The Supreme Court, 1971 Term-Forward: In Search Of Evolving Doctrine On A Changing Court: A Model For A Newer Equal Protection, 86 Harv.L.Rev. 1, 8 (1972).

Predictably, cases then arose that justified scrutiny exceeding that traditionally applied under the rational basis test but that did not meet the demanding criteria for admission to the strict scrutiny set. These cases, involving "sensitive although not necessarily suspect criteria of classification," or involving "important" personal interests or "significant interference with liberty or a denial of a benefit

vital to the individual,"[2] have usually received the critical analysis they deserve, albeit by virtue of diverse judicial rationale utilized to justify the increased scrutiny. This Court has recognized those middle-ground cases as a discreet category for purposes of equal protection analysis, affording "heightened scrutiny" to cases falling within that category, but apparently offering no differentiated approach to cases within a single category. Hornbeck v. Somerset Co. Bd. of Educ., 295 Md. 597, 640-42, 458 A.2d 758 (1983); Waldron, supra.

Another approach has been to apply the rational basis test more critically when the facts of a case place it within the upper level of the

---

2. L. Tribe, American Constitutional Law § 16-31 p. 1090 (1978).

spectrum of that category. City of Cleburne, Tex. v. Cleburne Living Center, 473 U.S. 432, 105 S. Ct. 3249, 87 L.Ed.2d 313 (1985) (White, J., plurality opinion). This approach was promptly labeled a "second order" rational basis review. City of Cleburne, supra, 105 S. Ct. at 3263 (Marshall J., concurring in part and dissenting in part). Yet another approach is espoused by Justice Stevens in his concurring opinion in City of Cleburne, in which Chief Justice Burger joined.

> [O]ur cases have not delineated three - or even one or two - [clearly defined standards of equal protection review]. Rather, our cases reflect a continuum of judgmental responses to differing classifications which have been explained in opinions by terms ranging from "strict scrutiny" at one

> extreme to "rational basis" at the other. I have never been persuaded that these so called "standards" adequately explain the decisional process. Cases involving classifications based on alienage, illegal residency, illegitimacy, gender, age, or - as in this case - mental retardation, do not fit well into sharply defined classifications. City of Cleburne, supra, 105 S. Ct. at 3260-61 (footnotes omitted).

To the extent the dispute is one of substance and not semantics, I am of the opinion that the "continuum" or "full-spectrum" approach most effectively implements the constitutional mandate of equal protection. Utilizing this commendably flexible approach, or even using the "second order" rational basis approach, I find the restrictive provision of the statute at issue constitutionally infirm. Difficulty is encountered only

when the rigid discipling of the three-tier analysis, complete with the traditional "no-win" rational basis test, is mechanically applied. Even if forced to that analysis, however, I conclude that appropriate consideration of all the rights impacted by the statute would justify heightened scrutiny, and so yield the same ultimate result.

I turn to my second point - recognition of the several important rights impacted by the statute. Initially, there is the impact upon judges. An equal protection analysis must address the impact upon the class, but because Judge Hargrove's situation is representative, I shall refer to it.

At the time Judge Hargrove was

appointed to the federal trial bench he had accrued more than 16 years of creditable service with the Maryland Judiciary, serving at both levels of the trial courts, and had attained the age of 60 years. He therefore was eligible to retire and receive compensation in the amount of $38,664 per year from the Judicial Pension Plan.[3]

This Court has previously held that judicial pensions represent "a form of deferred compensation and not a substitute earnings plan." Waldron, supra, 289 Md. at 723, 426 A.2d 929. In Clark v. Tawes, 187 Md. 195, 200, 49 A.2d 463 (1946), our predecessors said that judicial pensions are

---

3. The Judicial Pension Plan is funded by contributions from the State and from the active judges. Each judge contributes 6% of his or her salary for the first 16 years of service.

> part of the inducement which leads competent persons to give up the greater emoluments of private employment for lesser compensation by the State. This is usually stated to be peculiarly applicable to judges who are generally able to make more in private practice than they can on the bench, and who thereby give up all chance of further increase in their estates for a fixed salary which ends when they reach a certain age.

In recommending and in fixing judicial salaries the Judicial Compensation Commission and the Legislature of this State routinely consider the earnings of attorneys and compare those earnings with the compensation packages of judges, the major components of which are the judge's salary and the State's contribution to the judicial pension fund. No effort is made to establish a judicial compensation package equalling the earnings of comparable private practitioners, for it is always assumed

that public service demands a financial sacrifice. But even when a substantial discount is made to accommodate the public service factor, the reduced figure is not paid solely by salary. Instead, it is paid by a combination of salary and the State's contribution to the judges' pension plan.

It is clear that a judge's pension is not a windfall. It is deferred compensation, and is treated as such by the Legislature in fixing judicial salaries. It is fully earned, partially funded by the judges, and one of the reasons highly qualified attorneys are willing to accept judicial positions. The judge who makes the initial financial sacrifice

ordinarily involved in the acceptance of a judicial position, who earns his or her compensation package through the required years of service, and who makes the required contributions to the fund, has a significant interest and reasonable expectation of receiving and enjoying, at the time of retirement from state judicial service, that part of the compensation which has been deferred. Curtailment of the right to receive that which has been earned, and for which sacrifices have earlier been made, should be permitted only where demonstrably required to accommodate legitimate State interests.

Even more important than the private rights of the individual judges

are the rights of the people of the State and of the United States to maintain without unnecessary restriction the widest possible pool of highly qualified candidates from which the President may select those who will serve on the United States Supreme Court, the federal Courts of Appeals, and the federal trial courts. A state statute that has a significant chilling effect upon those who by experience, training, and demonstrated ability and temperament may be the most desireable candidates for those important offices should receive careful scrutiny. While not perfect, a useful analogy can be drawn to the ballot access cases. 4/

---

4. For a discussion of ballot access cases in several contexts, see Ahrens & Hauserman, Fundamental Election Rights: Association, Voting

In Turner v. Fouche, 396 U.S. 346, 362, 90 S. Ct. 532, 541, 24 L.Ed.2d 567 (1970), the Supreme Court identified the "federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." In Harper v. Virginia Board of Elections, 383 U.S. 663, 86 S. Ct. 1079, 16 L.Ed.2d 169 (1966), the Court, applying the stringent standard of close scrutiny, held that the imposition of an annual poll tax not exceeding $1.50 was a denial of equal protection. In Bullock v. Carter, 405 U.S. 134, 92 S.

---

and Candidacy, 14 Val.U.L.Rev. 465-85 (1980); Note, Better Late Than Never: The John Anderson Cases and the Constitutionality of Filing Deadlines, 11 Hofstra L.Rev. 691-732 (1983); Comment, Municipal Corporations: Extraterritorial Powers Without Voting Rights - Equal Protection Considerations?, 31 U.Fla.L.Rev. 631-44 (1979).

Ct. 849, 31 L.Ed.2d 92 (1972), the Court considered a Texas statute that imposed substantial filing fees upon candidates, noting that:

> [T]he rights of voters and the rights of candidates do not lend themselves to neat separation; laws that affect candidates always have at least some theoretical, correlative effect on voters. . . . Texas does not place a condition on the exercise of the right to vote, nor does it quantitatively dilute votes that have been cast. Rather, the Texas system creates barriers to candidate access to the primary ballot, thereby tending to limit the field of candidates from which voters might choose. 405 U.S. 143, 92 S. Ct. at 856 (footnotes omitted).

Acknowledging that not all statutory barriers to candidate access to the ballot will require strict scrutiny, the Court went on to assess the impact of the filing-fee requirement on the

exercise of the franchise. Finding that impact "real and appreciable" the Court applied strict scrutiny and invalidated the statute.

The instant case is one step removed from a classic voting rights case. The voters do not directly suffer the restriction of the pool of candidates because, as is typical of a representative democracy, the selection of the persons to fill these important positions is made by a person who has in turn been selected by the voters. However, the ultimate impact upon the people and their government is the same - some of the best qualified candidates are significantly impacted by the legislation. Given the differences that exist between this case and ballot access cases to which I have referred, I am reluctant to urge the application

of the strict scrutiny standard here. I believe, however, that the impact upon the public, considered in conjunction with the economic impact upon the involved class of judges and the impact upon their right to be considered as candidates for federal judicial office, justifies a heightened scrutiny, whether denominated as such or as a "second order" rational basis scrutiny. Of course, if the "continuum" or "full-spectrum" sliding scale approach is used, one simply determines how high on the scale the impact is properly placed, and whether there has been shown to exist a state purpose sufficient to justify an impact of that magnitude. Under any of these tests, I believe the restrictive provisions of this statute fail to pass constitutional muster.

The discrimination here is readily apparent. Of all State employees and officials, only judges suffer a setoff of pension benefits upon acceptance of a federal position. As the parties stipulated:

> By contrast with the Plaintiff, or any other retired judge of the State of Maryland, if the Governor, Lieutenant Governor, Attorney General, or Comptroller, all of whom now are attorneys, were appointed a federal district judge, each would be entitled to collect his full vested pension benefits.

The impact of this restriction has been discussed. There remains for consideration the State purpose served by the statute. The State suggests a threefold purpose: 1) to prevent the appearance of impropriety, 2) to prevent "double-dipping", and 3) to encourage State judges to remain on the bench rather than accept more lucrative

public employment. The majority makes no attempt to exalt the importance of these goals. Perhaps that results from the fact that traditionally there has been no need to evaluate the necessity for, or potential efficacy of, legislation being analyzed under the rational basis test - a test more often than not interpreted to mean any conceivable basis rather than any conceivable rational basis. But it seems to me equally possible that the majority's treatment of the State's proffered purposes may accurately reflect the fact that they deserve a low position on the spectrum of importance.

"Double-dipping," as that term is commonly employed, means receiving a government salary in addition to a pension from the same government.

Technically, there is no "double-dipping" when the pension is paid by one sovereign and the salary by another. In a broader context, however, it may be urged that "double-dipping" should include multiple payments from governmental funds, without regard to the identity of the government. The focus should be upon the evil that the State seeks to rectify, and not upon the term used to describe it. Accordingly, the proper inquiry is whether the concurrent receipt by a judge of pension payments from the State and a salary from the federal government is a situation so inimical to the interests of the people of the State that it justifies the impact we have described and the imposition of the restriction upon judges alone.

As previously discussed, the pension payments to a judge are in reality deferred compensation, and I am not persuaded that the Legislature could rationally conclude that it would in any manner be improper for a judge to collect that which he or she had already earned along with that which the judge was then earning. Had the full compensation package of the judge been paid as salary and had the judge devoted a portion of it to the purchase of a private annuity, it could hardly be said that the judge who later accepted federal employment should not also have the benefit of the annuity. The situation here is the same, except that instead of paying the entire compensation to the judge as salary, the State has paid a portion into a fund, which together with the

contributions made by the judge is actuarily sufficient to "purchase the annuity" i.e. to fund the pension payments.

In the alternative, if there can be divined some evil inherent in this process that perhaps my abiding personal interest in the subject causes me to overlook, I nevertheless fail to see why it is wrong for judges to receive the pension, but not wrong for governors, attorneys general, comptrollers and senators to do so. Indeed, given the nature of judicial pensions as heretofore discussed, one would think payments to judges would be the least suspect. This brings me to consideration of another purpose advanced by the State - that judges must avoid the appearance of impropriety. Certainly judges do and

should occupy a position of particular trust and confidence in our society, and they are properly held to high standards of conduct. It is not enough to hold that receipt of both payments is entirely ethical and proper, for if the public perception is otherwise the public confidence in the judiciary may in some measure be undermined by allowing the payments. Having identified this as a potential problem that properly may have been considered by the Legislature, I hasten to add that my practical assessment is that its gravity is very low, and certainly insufficient on balance to justify the substantial impact of the discriminatory statute.

The final reason advanced, that the Legislature may have enacted the restrictive legislation in order to

discourage judges from accepting federal employment, seems to me so patently and impermissibly provincial and so contrary to the best interests of a strong federal government as to be unworthy of further comment. To the extent that it could legitimately be given any weight, that weight is too slight, either singularly or when considered with the purpose of avoiding the appearance of impropriety, to justify the substantial impact of the restrictive provisions of the statute.

I would reverse the judgment of the Circuit Court for Baltimore City and remand the case to that Court for entry of a summary declaratory judgment consistent with the views expressed herein.

JOHN R. HARGROVE 3524 Ellamont Road Baltimore, MD 21215,	*	IN THE CIRCUIT COURT
Plaintiff,	*	FOR
v.	*	BALTIMROE CITY
BOARD OF TRUSTEES FOR THE MARYLAND STATE RETIREMENT SYSTEMS Serve on: Bennett Shaver Executive Director 301 W. Preston Street Baltimore, MD 21201 and Stephen H. Sachs Attorney General 7 N. Calvert Street Baltimore, MD 21202	*	85134024/CE34575
Defendant.		

* * * * * * * *

O P I N I O N

This is a complaint for declaratory judgment filed by the plaintiff, The Honorable John R. Hargrove of the United States District

Court for the District of Maryland, seeking to have a section of the Annotated Code of Maryland dealing with judicial pensions declared unconstitutional. The complaint requests the Court to declare that:

> "A. Article 73B, 56(c)(1) of the Maryland Code, insofar as it is interpreted to require that Plaintiff's pension and other retirement benefits not be paid because Plaintiff accepted a presidential appointment, and now serves, as a Federal District Judge for the District of Maryland, is invalid as an inactment in controvention of the Constitution of Maryland;

B. Plaintiff is entitled to receive all pension and retirement benefits which have bested in him as a result of his years of membership service in the Judicial Pension Plan, his contributions to the Judicial Pension Plan, and his having retired from active service as a Judge of the State of Maryland after attaining age of 60 years; and

C. Defendant is obligated to pay all pension and retirement benefits which have been denied Plaintiff since February 18, 1984, in reliance on Article 73B, Sec. 56(c)(1)."

Article 73B, Sec. 56(c)(1) of the Maryland Code, which is the section plaintiff contends is unconstitutional, states as follows:

> "Except as provided in paragraph (2) of this subsection, a retired judge eligible for benefits under this subtitle may accept employment in which all or part of the compensation for the employment comes from municipal, county, State or Federal funds, if he immediately notifies the board of trustees of the Employee's Retirement System of his intention to accept the employment and specifies the compensation to be received for the employment. The annual retirement allowance receivable by the former judge plus the annual compensation for the position may not exceed in amount the compensation upon which the retirement allowance is based. During any period in which the total of the annual retirement allowance and the annual compensation for the position in fact exceeds the compensation upon which the retirement allowance is based, the retirement allowance shall be reduced by that amount necessary to bring the former

judge's total compensation within the limit specified in this subsection. If a retired judge accepts employment in accordance with this subsection and is subsequently awarded retirement benefits as a result of that employment, his retirement benefits under this subtitle shall be reduced in the amount of the retirement benefits resulting from the subsequent employment."

The facts giving rise to this contest began in February of 1962 when the plaintiff was appointed Judge of the People's Court of Baltimore City. The plaintiff continued in this capacity until March 2, 1968 when he was appointed to the Municipal Court of Baltimore City. Then in July of 1971, the District Court of the State of Maryland was created by legislative enactment. This uniform statewide court system abolished the Municipal Courts, People's Courts and

Magistrate's Courts in the state. The plaintiff became a Judge of that Court when the District Court system went into effect. He remained on that Court until July of 1974, when he was appointed to the Supreme Bench of Baltimore City, now designated the Circuit Court for Baltimore City. On February 17, 1984, the plaintiff retired from the Circuit Court for Baltimore City and on February 18, 1984, accepted an appointment from the President of the United States to serve as a Judge of the United States District Court for the District of Maryland.

A judge who has sixteen years of judicial service and who has attained the age of 60 is entitled to a full judicial pension except for the statute quoted above. A state judge

can add military time to attain the required 16 years of judicial service after ten yers.

It is clear from the facts in this case that Judge Hargrove, who has three years of military service, has the required 16 years of judicial service. Judge Hargrove reached the age of sixty on October 15, 1983. Thus, if Article 73B, §56(c)(1), Maryland Code, is unconstitutional the plaintiff is entitled to a full State Judicial Pension.

The plaintiff's main thrust is that the quoted statute is unconstitutional because it violates equal protection of the laws. The Maryland Constitution does not have an equal protection provision but such constitutional arguments are embelished in Article 24 of the Maryland

Declaration of Rights, which is the due process article. Board of Suprs. of Elections v. Goodsell, 284 Md. 279, 396 A.2d 1033 (1979); Detroit Automotive Purchasing Sevs., Inc. v. Lee, 463 F. Supp. 954 (D. Md. 1978).

The Federal Courts in analyzing equal protection cases have utilized three tests. They are, 1- the strict scrutiny test, 2 - heightened scrutiny test and, 3 - the rational basis test.

The strict scrutiny test is applied when a legislative enactment involves a fundamental constitutional right or a suspect classification. The test almost always results in the act being declared unconstitutional. This test is not applicable here and the plaintiff does not so contend.

The heightened scrutiny test is utilized when important personal rights which do not merit strict scrutiny are involved. Here, the Court seriously examines the actual purpose of the statute and the means used to accomplish the purpose. Vance v. Bradley, 440 U.S. 93, 99 S. Ct. 939, 59 L.Ed. 2nd 171; San Antonio School District v. Rodriquez, 411 U.S. 1, 93 S. Ct. 1278, 36 L.Ed. 2d 16 (1973).

The rational basis test is used in those cases which do not involve fundamental constitutional rights, suspect classifications or important personal rights. Under this test, the legislative enactment is held constitutional when any state of facts reasonably may be conceived to justify it. Obviously, this test normally

results in the legislative enactment being held constitutional.

Attorney General v. Waldron, 289 Md. 683, 426 A.2d 929, challenged the constitutionality of a section of the Maryland State Code on Judicial Pensions which prohibited payment of pensions to retired state judges who practiced law. This case presented the court with a much stronger factual situation than that which exists here. In holding the section unconstitutional, the Court of Appeals of Maryland did not apply any of the tests used in the federal courts but utilized the following standard found on page 722 of the opinion:

> "Rather, we must evaluate either those statutory purposes which are readily discernible or a legitimate purpose that, presumably, motivated an impartial Legislature. Cf. U.S. Railroad Retirement Bd. v.

> Fritz, supra at -, [49 U.S.L.W. at 4039-40] (Stevens, J., concurring). By this we mean those purposes that are obvious from the test or legislative history of the enactment, those plausibly identified by the litigants, or those provided by some other authoritative source."

The Court of Appeals of Maryland has decided other equal protection cases by applying the rational basis test. See Attorney General v. Waldron, supra. (hereinafter referred to as Waldron).

Based on the facts in this case and those presented in Waldron, this court concludes that the appellate court will use either the standard set forth in Waldron or the rational basis test.

Assuming the court's application of the standard utilized in Waldron, this court must examine the

purpose of the legislature in passing Art. 73B, Sec. 56(c)(1), legislative history of the enactment, purposes plausibly identified by litigants or purposes provided by some other authoritative source.

Emphasis has been placed on double dipping as the legislative purpose of the section. It appears, however, that another purpose existed in the minds of our legislators when this section was passed. The legislature recognized the experience and knowledge which retired state judges amass during their tenure, and wanted to find a way for society to benefit from competent retired judges. This meant the legislature had to weigh the desirability of preventing double dipping against the utilization in the public sector of competent retired

state judges. This resulted in a compromise and the enactment of the section here involved. It was felt that the section protected against double dipping while allowing public employment.

Legislative history further supports this purpose. The Governor's Commission to Study Judicial System Pensions which was established by Resolution No. 8 of the 1975 General Assembly calling for the appointment of the commission by the Governor said in its first report made in January of 1976, just prior to the enactment of the statute in Part III D. of the report on page 5:

> D. Modification of Prohibition Against Post-retirement Public Employment
>
> Art. 73B, §56(d) provides that "a former judge who accepts a municipal, county,

State, or federal salaried public office or employment may not be paid a pension . . . while he remains in the public office of employment."

The effect of this provision is far-reaching. For example, it effectively prevents a retired judge from serving as a compensated member of a municipal or county council, because of the potential loss of income.

Whatever the value of such restrictions under a non-contributory pension system, the general value of permitting able and experienced people to engage in public employment would seem to outweigh the usefulness of a total prohibition, when a contributory pension system is involved.

As a general proposition, it appears that the non-judicial State employee who retires is not prevented from accepting federal, municipal, or county employment. He may accept "temporary" State employment subject (with some exceptions) to a ceiling on combined pension and salary income; Art. 73B §11(14).

The Commission is aware of the problem of "double-

> dipping," but nevertheless believes that a retired judge should be permitted to accept public office or employment, provided that the combined salary and pension do not exceed the total judicial salary the judge was receiving while in active judicial service. This is a somewhat more stringent rule than that applicable to non-judicial retired employees, but appears to be a reasonable compromise between unlimited "double-dipping" and the beneficial policy of permitting retired judges to be available for a least limited public office or employment.
>
> A bill to accomplish this objective is attached hereto as Exhibit 3.

This report was available and considered by the legislature when the general assembly enacted Art. 73B, §56(c)(1).

A reading of the section's text likewise supports the balance struck between double dipping and the use of retired judges in the public

sector for it establishes a formula based on the amount of pension, the amount of compensation from public employment and the salary of an active state judge.

The plaintiff argues that other state employees are not subject to the limitations imposed on retired judges by the statute. There is not a requirement that all state employees be treated alike by the legislature when pension bills are passed. The argument was put to rest in Clark v. Tawes, 187 Md. 195, 49 A.2d 463 where Chief Judge Marbury wrote:

> "The class of statutes usually known as retirement acts which provide pensions for different classes of State employees need not be alike as to all employees."

It is also alleged that double dipping does not exist in this case

because the plaintiff receives a salary from the federal government and would receive a pension from the state government. Thus he is not collecting twice from the same sovereign. This argument seems specious to the court. The citizens of Maryland are taxpayers to whom it matters little out of what coffer an individual receives money. Although the total tax dollars paid go into separate state, federal and local coffers, the money eventually received by an employee all comes from the same general fund made up from the total taxes paid by citizens of the state. The general assembly has a legitimate purpose in seeing that these tax dollars aren't received by persons in unusual amounts, regardless of whether the total is comprised of state and federal dollars or just state dollars.

The purpose of the state judicial pension statute is to grant a retired judge a good pension because of his years of service to the state when he could have been compensated more by practicing law. The purpose was not to generate good income from pension and then allow the addition of a high salary from public employment thereby establishing a very high income all to be paid from tax dollars. Such concern does not arise when one receives a pension and earns additional money from the private practice of law.

Legislative purpose and arguments of the Attorney General relating thereto, legislative history and the text of the section all support the wisdom, reasonableness and prudence of the legislature in passing the section. The legislature obviously

weighed the then proposed statute carefully having required study by and a report from a commission before passing the section in addition to the normal legislative process.

Having concluded that the statute passes equal protection muster under the Waldron test, it is readily apparent that the same rationale described above will support the section under the rational basis act. This court, therefore, holds that Art. 73B, 56(c)(1) is not unconstitutional because of equal protection violations.

Finally, the plaintiff contends the statute is unconstitutional because due process of law is violated. The argument is based on contributions made to the pension fund without the ability to presently receive a pension and without the right

to have the contributions refunded.

The plaintiff became a part of the state pension plan and contributed the required amount for a considerable period of time without objection. He did so at a time when he knew or should have known that the law prohibited public employment. The law was not passed after he became part of the pension plan. The only change would have been in 1976 which changed the law from complete prohibition to the present formula. This was beneficial to the plaintiff because it relaxed the previous strict prohibition. There came a time when the plaintiff had to make a choice between retiring and accepting his present position which would prevent him from presently receiving a pension, remaining a state judge until he decided to retire or

retiring and receiving a state pension. This choice was made at a time when the plaintiff knew or should have known about the amended statute. The choice was not so oppressive that it constituted a taking of property in violation of due process of law. Furthermore, the state judicial pension statutes contemplated this problem and addressed it by allowing a retired judge to withdraw his contributions to the pension fund if he applies for the refund within a certain time after retirement. Ar. 73B, §57(k) provides:

> "At the time of termination of his service, or within six months thereafter, but before receiving a pension payment, a former judge may elect to withdraw in a lump sum his accumulated contributions to the fund plus interest at four percent from the dates of payment. If he elects to withdraw, he has no further rights under the pension plan."

Thus, the plaintiff at a time when he know or should have known of Art. 73B, Sec. 57(k), was presented with another decision. For reasons of his own he chose not to request the refund in accordance with the statute. This provision in the code also answers the contention that he has been deprived of property in violation of due process because his contributions have not been returned. The law provided for the refund but the plaintiff chose not to take advantage of it. This court, therefore, holds that Art. 73B, Sec. 56(c)(1) is not unconstitutional because of a violation of due process.

For reasons stated above, Art. 73B, Sec. 56(c)(1) is held to be constitutional.

The parties having stipulated to the facts in this case and there being no genuine dispute as to a material fact, the motion for summary judgment filed by the defendant is granted. The clerk is ordered to make the following docket entry: Defendants's motion for summary judgment granted; judgment for the defendant plus costs. Plaintiff's motion for summary judgment denied.

/s/
Edward A. DeWaters, Jr.
Judge

September 17, 1985
Date

EAD/vc

cc: M. Albert Figinski, Esquire
Avery Aisenstark, Esquire
Susan K. Gauvey, Esquire
Mark Noren
6936f